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Supreme Court, U.S.
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No. 95-1068

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

JOHN D. LUTHER,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

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1. Contrary to respondent's characterization of the issue in this case, Opp. at 4, 7, there is a starkly defined and judicially acknowledged split among the lower courts as to the threshold showing that a defendant in a case brought under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, must present in order to have the question of a plaintiff's contributory negligence submitted to a jury. While respondent contends that "Plaintiff is only chargeable with his/her own conduct," Opp. at 7, this case demonstrates that in jurisdictions where a defendant's evidence must overcome a greater burden than plaintiff's evidence before it may be considered by a jury, a plaintiff may *not* be held accountable for his or her own conduct. Precisely because the application of different standards in different courts produces the inequitable consequence that in some jurisdictions a plain-

tiff may not be held accountable for his own actions, this Court should grant the petition and consider this case on the merits.

Further, contrary to respondent's assertion, Opp. at 3, the facts in this case provide a striking illustration of the inequity of requiring defendants to meet a higher threshold of proof than plaintiffs in order to raise a jury question concerning negligence. Indeed, Justice Stevens has already found in staying the mandate of the court below, Order (Jan. 10, 1996), that there is at least a "significant possibility" that if the Court grants certiorari the judgment below will be reversed. See, *e.g.*, *Edwards* v. *Hope Medical Group for Women*, 115 S. Ct. 1 (1994) (Scalia, J., in chambers) (discussing standard for granting stay); *CBS, Inc.* v. *Davis*, 114 S. Ct. 912 (1994) (Blackmun, J., in chambers) (same).

As the dissenting justice in the court below observed, "[I]f you exclude plaintiff's acts as the cause of the accident, there is not anyone else or any other agency that we can point the finger at as the cause of plaintiff's injury." Pet. App. at 17a (Lewis, J., dissenting). Nevertheless, it is petitioner who has been held liable to respondent for $1.5 million. Because the facts demonstrate so starkly that requiring a defendant in a FELA case to make a greater prima facie showing than a plaintiff may have the absurd result of preventing a plaintiff from being held accountable for his own acts, this case is particularly well suited for consideration by this Court.

2. The central question in this case is whether a court errs when it requires a defendant, in order to overcome a directed verdict motion, to demonstrate that a plaintiff's actions were not simply unreasonable, but that they tended to "add new dangers" to existing conditions, while requiring a plaintiff to show only ordinary negligence on a defendant's part. Contrary to respondent's contention, Opp. at 4, 7, not only is there a clear split among the

federal circuit courts on this issue, it is a split that is openly acknowledged. For instance, in *Fashauer* v. *New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269 (3d Cir. 1995), the Third Circuit explicitly distinguished its approach to contributory negligence from the approach adopted by the Eighth Circuit in *Birchem* v. *Burlington N.R.R.*, 812 F.2d 1047, 1048-49 (8th Cir. 1987), stating, "We are not persuaded by the *Birchem* court's analysis." *Fashauer*, 57 F.3d at 1279.

Birchem and *Fashauer* consciously represent two distinct legal approaches to contributory negligence. The *Birchem* court (like the courts below in the instant case) followed the approach articulated by the Ninth Circuit, which requires a defendant to demonstrate not simply that a plaintiff had acted unreasonably in performing his job, but that he had "add[ed] new dangers" to existing conditions. 812 F.2d at 1049 (quoting *Taylor* v. *Burlington N.R.R.*, 787 F.2d 1309, 1316 (9th Cir. 1986)); see also Pet. at 8, 11 (citing cases). Even though the plaintiff knew that the "mudjack'" he was using to lift sections of railroad track was defective and that use of defective equipment was a violation of company safety rules, the district court found, and the Eighth Circuit affirmed, that the plaintiff had not added any new dangers to the existing circumstances. Therefore, the question of whether the *Birchem* plaintiff had exercised ordinary care was withheld from the jury. Under the standard used in the Eighth Circuit, the defendant's evidence showed merely that the plaintiff had assumed a risk, a defense that is not allowed under the FELA. *Birchem*, 812 F.2d at 1049.

The Third Circuit rejected the Eighth Circuit's approach as taking too "expansive" a view of the impermissible defense of assumption of the risk, *Fashauer*, 57 F.3d at 1279, and, conversely, too narrow a view of the permissible defense of contributory negligence. The Third Circuit's view of assumption of the risk encompasses only evidence that demonstrates that an employee "implicitly

consented to the risk by accepting employment with the railroad or by performing a task in the manner which the employer directed." *Id.* at 1280. A jury should not be permitted to consider this type of evidence in a FELA case. However, as to all other actions of a plaintiff, "if they are evidence of negligence they should be admitted to show contributory negligence." *Id.* Thus, a jury may consider evidence that a plaintiff "fail[ed] to act prudently in performing the task." *Id.* In the Third Circuit, but not in the Eighth Circuit and, as this case illustrates, not in the Illinois state courts, evidence that a plaintiff failed to exercise "reasonable alternatives available to him," *id.* at 1279, may be adduced to demonstrate contributory negligence.

A third standard, applied in the Fifth and Sixth Circuits, holds both plaintiff and defendant to the same threshold inquiry in order to reach a jury: whether there is any evidence, however slight, to demonstrate that the other party failed to exercise ordinary care. *E.g., Tipton* v. *CSX Transp., Inc.*, No. 91-3333, 1992 WL 43540 (6th Cir. Mar. 9, 1992) (unpublished op.); *Page* v. *St. Louis Southwestern Ry.*, 349 F.2d 820, 822-23 (5th Cir. 1965); see also Pet. at 8 (citing state cases applying "ordinary reasonableness" standard). While the Third Circuit approach permits a jury to consider evidence that a plaintiff acted unreasonably, it first inquires whether the evidence demonstrates only that the plaintiff was "performing a task in the manner which the employer directed." *Fashauer*, 57 F.3d at 1280. If the employee was following the employer's specific instruction, the jury may not consider the reasonableness of the employee's actions.[1] The ap-

[1] Respondent alleges that he performed his tasks "specifically as directed by his foreman." Opp. at 3. However, he does not claim (and indeed cannot claim) that respondent's foreman specifically instructed him *not* to clean the truck bed or *not* to clear a path before replacing the saw. Respondent cites only the *absence* of a specific instruction—that the foreman "did not order the Respond-

proach in the Fifth and Sixth Circuits does not impose this additional barrier to jury consideration of evidence that an employee acted unreasonably.

In *Tipton*, where an employee alleged injury from hauling trash bins to a dumpster, there is no indication that the court inquired into whether the employee was acting pursuant to a specific employer instruction, and the Sixth Circuit upheld an instruction that the jury consider whether the employee had exercised "ordinary care to avoid injury." 1992 WL 43540, at **2; see also *Page*, 349 F.2d at 823 ("So far as negligence is concerned, that standard is the same—ordinary prudence—for both Employee and Railroad alike."); *Hval* v. *Southern Pac. Transp. Co.*, 592 P.2d 1046, 1048 (Or. Ct. App. 1979); *cf. Ganotis* v. *New York Cent. R.R.*, 342 F.2d 767 (6th Cir. 1965) (per curiam) (same standard of proximate causation for employee and railroad).

3. Currently, the jurisdiction in which a case is heard, and thus the threshold inquiry applied to a defendant's evidence, may determine whether a jury is permitted to consider how a plaintiff's own failure to exercise ordinary care has contributed to his injury. While respondent asserts that the "tendency to add new dangers" standard, which was applied to petitioner's evidence in this case, "does not relieve a Plaintiff from the duty to exercise reasonable care for his/her own safety," Opp. at 7, the decision below demonstrates the fallacy of this proposition. In those jurisdictions in which a defendant must demonstrate that a plaintiff's acts were not merely unreasonable but actually added new dangers to the existing situation,

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ent to clean the truck bed." *Id.* Respondent cannot manufacture from the absence of an instruction an affirmative direction not to take certain safety precautions before replacing the saw. Respondent decided on his own how to perform the task of replacing the saw. Therefore, even under the Third Circuit's approach, a jury would have been allowed to consider evidence of respondent's failure to exercise reasonable alternatives in performing that task.

a plaintiff *is* relieved of his duty to exercise reasonable care for his own safety.

The inequitable consequences flowing from a court's imposition of a greater burden on defendant's evidence than on plaintiff's evidence are particularly marked here where, as Justice Lewis found in dissent, respondent probably was the *sole* cause of his own injury. Pet. App. at 17a. Justice Lewis enumerated reasonable measures that respondent might have taken to ensure safe placement of the saw on the truck bed without doing any injury to himself. *Id.* at 16a-17a. He might have cleared a path to an empty spot; he might have put the saw down temporarily, moved closer to the empty spot and then placed the saw there; or he might have located a safe place for the saw before accepting it from the foreman. *Id.* However, because the trial court found that the evidence did not show that respondent actually added new dangers to his situation, the court prevented the jury from considering whether respondent's failure to exercise any of the reasonable alternatives available to him contributed to his injury.[2]

4. Requiring the question of plaintiff's negligence to overcome a greater burden than the question of defendant's negligence in order to reach a jury is contrary to Congress's intent to base "determinations of employer-employee responsibilities" on "equitable principles." *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 65 (1943). The issue in *Tiller* was whether any aspect of the common law

[2] Respondent argues, Opp. at 2-4, at some length that he did not act negligently, but Justice Lewis's opinion reveals plainly that the only basis for removing the issue of respondent's negligence from the jury was the higher legal standard adopted by the majority below. There was certainly a basis in the evidence for the jury to have concluded that respondent acted imprudently and that his actions contributed to his injury. To be sure, the jury might have concluded that respondent acted reasonably under all of the circumstances, but that issue is still a factual one and should have been submitted to the jury.

defense of assumption of the risk had survived the 1939 amendment to the FELA. In concluding that no aspect of assumption of the risk had survived, the Court noted the intent behind the amendment, as expressed in the Report of the Senate Judiciary Committee:

> [to] establish the principle of comparative negligence, which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned.

Id. (quoting S. Rep. No. 661, 76th Cong., 1st Sess. 4 (1939)). Nothing in *Tiller* suggests that Congress intended not only to eliminate a major barrier to employees' claims but also to impose a new barrier to employers' defenses. Yet a judge's inquiry into whether an employer's evidence demonstrates that an employee "added new dangers," as in this and other cases, see Pet. at 11 (citing cases), makes reaching the jury substantially harder for an employer than for an employee.

In *Rogers* v. *Missouri Pacific R.R.*, 352 U.S. 500 (1957), this Court emphasized that the threshold showing of an employer's negligence necessary to reach a jury in a FELA case is very low. *Id.* at 506-10. The question for the trial court is simply whether there is any evidence "that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 506; see also W. Page Keeton, *et al., Prosser & Keeton on Torts* § 80 at 578-79 (5th ed. 1984) (observing that evidence of negligence that must be shown in FELA case is lower than what must be shown in ordinary tort case).

Consistent with the congressional intent to place employer and employee on a level playing field in FELA cases, there is no support for requiring a defendant to make a greater showing of plaintiff's negligence than plaintiff is required to make of defendant's negligence in

order to reach a jury. Just as a showing of "even the slightest" employer negligence will support jury consideration of plaintiff's case, *Rogers,* 352 U.S. at 506, so "equitable principles," *Tiller,* 318 U.S. at 65, require that a showing of "even the slightest" employee negligence support submitting the defendant's case to the jury. See *Dixon* v. *Penn Cent. Co.,* 481 F.2d 833, 835 (6th Cir. 1973) ("FELA cases that allow plaintiffs to reach the jury on a very slim showing of negligence permit defendants to go to the jury on the issue of plaintiff's negligence with equally slim showings."); *Higgins* v. *CSX Transp., Inc.,* 455 S.E.2d 129, 131 (Ga. Ct. App. 1995); *Hickox* v. *Seaboard Sys. R.R.,* 358 S.E.2d 889, 891 (Ga. Ct. App. 1987); *Prosser & Keeton on Torts* § 65 at 453 ("[C]ontributory negligence, in general, is determined and governed by the same tests and rules as the negligence of the defendant."). However, by requiring a defendant to show that a plaintiff's acts "added new dangers" in order to reach the jury, a court, as in this case, raises the threshold considerably above the very low barrier established in *Rogers.*

* * * *

In *Rogers,* this Court took note of "its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the [FELA] and to prevent its erosion by narrow and niggardly construction." 352 U.S. at 509. In view of the "equitable principles" governing employer and employee responsibilities under FELA, *Tiller,* 318 U.S. at 65, this obligation should apply when administration of the Act prejudices employers, as in this case, as well as when it prejudices employees.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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